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No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWS SYNDICATE COMPANY, INC., AND NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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prentice training program or by passing a competency test (R. 1291–1292; 533–534). The mail room foreman had the exclusive right under the contract to hire apprentices (*ibid.*). He also served under the contract as an "impartial examiner," who, together with the Union's membership committee, administered competency tests to prospective journeymen, who were invariably persons selected by the Union for induction into union membership (R. 1292; 204, 206, 215).

In practice, these programs were operated as follows: When the Union decided that more employment was available, it substantially curtailed the prescribed six-year apprenticeship program so that its apprentices could take the competency test (R. 707; 483–484). And, in the spring of 1956, in order to have its members perform the increased amount of work that had become available in the New York City newspaper mail rooms, the Union decided to accept into membership, and gave competency tests to, 125 non-union extras (R. 668–669; 123–124, 179–181).[*] The publishers, including the News, did not participate in the decision to enlarge the Union's membership or in arranging the method by which eligibility for membership, and consequently more regular employment, was to be determined. They merely furnished the Union with requested data (R. 669; 124–125).

At the News, the Union selected 31 of 60 employees on Union Foreman Rottenberg's list of the non-union extras who had received the greatest amount of extra

[*] Insofar as the record shows, no employee selected for induction into the Union ever failed to pass the competency test (R. 707, n. 5).

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work in 1954 and 1955 (R. 660; 180). Of these, 30 ranked below employee Burton Randall. They were all inducted into union membership on June 10, 1956, and were placed on the Union's priority list of regular work before Randall (R. 673–674; 48, 148–149). As a consequence, Randall, who shaped regularly on Friday and Saturday evenings, was required to work later hours and perform more difficult work, and lost overtime pay (R. 674; 20–23, 56).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the News violated Section 8(a) (1) and (3), and the Union violated Section 8(b)(1)(A) and (2) of the Act, by their contract arrangements and by operating an unlawful closed shop and preferential hiring system. In the Board's view, the contract clause purporting to incorporate ITU General Laws "not in conflict with * * * federal or state law," evaluated in light of foreseeable employee reaction, in effect incorporated those portions of the Laws providing for a closed shop and delegating to the Union complete control over employment priority and seniority. Moreover, the Board found that the contract provisions vesting exclusive control over employment in union foremen, who were bound to follow the Union's laws, also evidenced an intent to operate under closed-shop conditions, and delegated exclusive control over hiring to the Union without the requisite safeguards established by the

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OPINIONS BELOW

The opinion of the court of appeals (R. 821–836) is reported at 279 F. 2d 323. The findings of fact, conclusions of law, and order of the Board (R. 635–695, 703–728, 751–760) are reported at 122 NLRB 818.

JURISDICTION

The opinion of the court of appeals was filed on May 20, 1960 (R. 821–836), and its decree was entered on June 8, 1960 (R. 836–837). The petition for a writ of certiorari was filed on August 18, 1960, and was granted on November 7, 1960 (R. 837).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or

the effective date of such agreement, whichever is the later * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *

QUESTIONS PRESENTED

The principal question presented is whether the Board may properly conclude that a collective bargaining agreement which purports to incorporate union working rules "not in conflict with * * * federal or state law," but does not particularize that the rules requiring union membership as a condition of employment are excluded as illegal, establishes a discriminatory hiring system which encourages union membership, in violation of the National Labor Relations Act.[1]

[1] If the Board's position on the principal issue be sustained, the following additional questions are presented:

(a) Whether the contract unlawfully encouraged union membership by delegating to the union power to control employment priority and seniority in accordance with the working rules.

(b) Whether the contract unlawfully encouraged union membership by vesting exclusive control over hiring in union foremen who were obligated to follow the working rules requiring employees to be union members.

(c) Whether the contract unlawfully encouraged union membership by vesting exclusive control over hiring in the union without adequate safeguards to assure employees that the power would be exercised without regard to union membership considerations.

The conclusion of the court below that the contract was not vulnerable on these grounds was so entwined with its holding on the principal question that a reversal of that holding would make appropriate a remand to that court for reconsideration of the subsidiary questions. It may be noted that two of these issues are presented in companion cases now before the Court, "(b)" in No. 340, and "(c)" in No. 64.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *The contract and "General Laws" provisions.* Respondent Union, affiliated with the International Typographical Union (ITU), represents employees in the mail rooms of all New York City newspaper publishers. In December 1954, and again in 1956, respondent News Syndicate Company, Inc. (hereinafter called the News), publisher of the New York Daily News, signed collective bargaining contracts negotiated by the Publishers' Association of New York City and the Union. The publisher of the Wall Street Journal (hereinafter called the Journal) signed similar contracts with the Union.[2] Section 24 of the contract provided that "the General Laws of the International Typographical Union * * * not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein" (R. 641–642; 534).[3]

Section 5 of the contract limited mail room employment to "journeymen and apprentices" (R. 529). The ITU General Laws, however, provided that journeymen and apprentices must be ITU members and that each local union must establish a system of em-

[2] All New York City newspaper publishers affiliated with the Association subscribed to the 1954 and 1956 contracts (R. 527).

[3] The Laws referred to by the contracts in this case are those in effect during 1955, 1956 and 1957, all of which are essentially the same (R. 642, n. 5).

lead the employees to believe that they must join the union in order to secure and retain employment. Where, as here, the language has that effect, it violates the Act.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE "GENERAL LAWS" CLAUSE OF THE CONTRACT VIOLATED THOSE PROVISIONS OF THE ACT WHICH FORBID ENCOURAGEMENT OF UNION MEMBERSHIP BY DISCRIMINATION IN EMPLOYMENT

A. INTRODUCTION

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate" in violation of Section 8(a)(3). The latter provision, in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." A "closed shop" contract, which requires employees to join the union as a condition of employment, clearly violates these provisions. It classifies employees into two groups—those who are union members and those who are not—and declares that only the former can obtain employment. Hence, standing alone and apart from its actual enforcement, a closed shop contract effects a discrimination in regard to hire which tends to encourage union membership.[11]

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[11] See *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 689 (C.A. 2), certiorari denied, 338 U.S. 954; *Eichleay Corp.* v. *National*

ployment priority and seniority among union members (R. 642–647; 554–558).[4]

[4] The relevant provisions of the General Laws are as follows (references are to the 1957 edition, the one reproduced in the printed record):

ARTICLE V—FOREMEN

Section 11. All persons performing the work of foremen or journeymen, at any branch of the printing trade, in offices under the jurisdiction of the International Typographical Union, must be active members of the local union of their craft and entitled to all privileges and benefits of membership.

ARTICLE VII—MACHINES

Section 1. * * * None but members [of the ITU] shall be permitted to operate, maintain and service any mailing machinery or equipment when used on work under the jurisdiction of the International Typographical Union. * * *

Section 2. In machine offices under the jurisdiction of the International Typographical Union, no person shall be eligible as a "learner" on machines who is not a member of the International Typographical Union. * * *

ARTICLE VIII—MACHINE TENDERS AND MACHINISTS

Section 1. All machine tenders and machine tenders and machinists, members engaged in the adjustment, repair, and maintenance of all mechanical devices used in the performance of * * * mailing room work, shall be members of the [ITU] * * *. All work pertaining to maintenance and care of machines is to be performed exclusively by machine tenders who are journeymen or apprentice members of the [ITU].

ARTICLE X—PRIORITY

Section 2. Subordinate unions shall establish a system for registering and recording priority standing of members in all chapels, which shall be conspicuously posted or

Whether a contract requires union membership as a condition of employment is not always apparent from the face of the contract. That is, although the contract itself may not specifically impose such a requirement, other circumstances may make plain that it nonetheless exists. Thus, in *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782 (C.A. 7), affirmed on another point (see n. 21, *infra*), 345 U.S. 100 (the earlier litigation involving the International Typographical Union, which is described more fully pp. 28–32, *infra*) the imposition of closed-shop conditions was inferred from the fact that the union first insisted that there be no contract but only a condition of employment plan under which union members could quit work if nonunion employees were employed, and later offered the alternative of a contract cancellable upon 60 days' notice.[12]

The basic question in this case is whether the Board could properly conclude that the "General Laws" clause of the contract here had a similar effect, *i.e.*, imposing the requirement that employees be union members in order to obtain employment. Although the contract defines "journeyman" without regard to union membership considerations (R. 533), the ITU General Laws require that he be a member of the ITU

Labor Relations Board, 206 F. 2d 799, 803 (C.A. 3); *National Labor Relations Board* v. *F. H. McGraw*, 206 F. 2d 635, 641 (C.A. 6); *Katz* v. *National Labor Relations Board*, 196 F. 2d 411, 415 (C.A. 9).

[12] See also *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 688–689 (C.A. 2), certiorari denied, 338 U.S. 954.

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Section 4 of the contract provided that mail room superintendents, foremen, and assistant foremen must be members of the Union, and Sections 20a and 20b vested exclusive control over mail room employment in the foremen (R. 648–649; 528–529, 532–534). The Union's Constitution and Bylaws imposed on all members the obligation to observe all union rules, which include those restricting employment to union members (R. 650–651; 539–546, 544–558).

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kept in a place within the chapel accessible to members at all times. The priority standing of a member shall stand as recorded.

Section 5. Any member engaged to serve the International Typographical Union, a subordinate union or to perform work in the interest of the organized labor movement, or any member incapacitated by illness, shall not be deprived of priority standing while so employed or so incapacitated. Such member shall employ while absent the priority substitute competent to perform the work if one is available. The situation holder shall not suffer loss of situation or priority in the event such a substitute is not available. After thirty calendar days the situation shall be filled by priority substitute and considered in the category of a new situation. Upon reporting for duty full priority rights shall be restored.

Section 6. Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder from his or her situation for more than thirty calendar days, and whose priority is protected under the provisions of other sections of I.T.U. laws or contracts: *Provided*, Should a substitute with greater priority become available such substitute shall be placed on said situation: *Provided, further*, Local unions may establish by contract, for the purpose of avoiding multiple changes in preferred shifts and starting times, for the employment of the available priority substitute after thirty calendar days and continuing to but not more than ninety calendar days from absence of situation holder.

2. *The hiring practices.* The Board's findings as to the respondents' hiring practices[5] are as follows:[6]

The foreman initially selected for an evening's work union members whose names appeared on lists furnished by the chapel chairmen or job stewards. The names of fulltime employees, known as "regular situation holders," appeared on one list (R. 664; 14–15, 142, 546–549). The second list contained the names of "regular substitutes"—those who substituted for regular situation holders and were first selected for extra work when the size of the paper required the employment of additional mailers (*ibid.*). The foreman hired from these lists in priority order based on the date when the union member had deposited his union card with the chapel chairman (R. 664; 142–143, 171, 261–264). The foreman next hired union members from other papers who "shape the shop," taking first men who had not worked five days that week and then men who had already worked that period (R. 665; 14, 121, 143–144). Finally, if extra help were still needed after the supply of union men had been exhausted, the

[5] Although the Board's findings were, in large part, set aside by the court of appeals, the court's view of the facts appears to be dependent upon its initial premise, which we submit is erroneous, that the contract did not "incorporate" the closed shop provisions of the ITU general laws.

[6] Substantially the same hiring procedure was in effect in the mail rooms of all New York City newspaper publishers (R. 663; 123).

foreman hired non-union shapers (R. 1230; 15, 122, 144).[7]

It does not appear that the mail room foremen at the News and Journal ever deviated from this system of employment priority. Thus, while some non-union shapers had worked in the News mail room for over 10 years, performing virtually all operations, the foreman nevertheless required that outside card men, even though they had never before worked at the News, be hired before any non-union shaper (R. 666; 17–19). When employees at the News protested against the hiring of unusually large numbers of outside card men, who had shaped on the eve of a holiday for the double pay involved, Superintendent Rottenberg, the Union foreman in charge of the mail room, stated that he could do nothing about it because union men had to go to work ahead of the non-union men (R. 667; 93). Similarly, when vacation replacements were needed at the Journal during the summer of 1956, Foreman Every authorized the chapel chairman to get union men from other shops, who were then hired before non-union men who regularly shaped for work, including employee Julius Arrigale (R. 666; 405).

The Union also administered the apprenticeship and competency programs so as to prefer its members. Under the contract, a non-union mail room worker could gain journeyman status, and so qualify for regular employment, only by completing a six-year ap-

[7] While a seniority list for non-union shapers was not part of the Union's priority system, the foremen at the News and Journal maintained such lists based on the first date of employment at their mail rooms (R. 665–666; 144, 162).

closed shop was imposed mainly by the insertion of the ITU General Laws into collective bargaining contracts.

The origin and function of the General Laws have been described as follows (*International Typographical Union*, 86 NLRB 951, 970–971):

> The General Laws are traceable in their origin to the original custom of the Union—prevailing generally before collective bargaining contracts were first negotiated about 1886—of adopting scales of prices and operating rules of conduct, setting the conditions on which union members agreed to sell their services. As developed in more recent years, the "laws" constitute a union code of operating rules and minimum working conditions relating to the operation of ITU-organized composing rooms wherever located. * * *
>
> The requirements of the General Laws are considered by the ITU to represent the floor upon which the structure of collective bargaining is erected. Locals bargain for wages and economic conditions not covered by the laws, or only partially covered; and where minimum conditions are prescribed, they may bargain for more than the minimum. But they may not, without contravening the "laws," bargain away

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ceedings involving the ITU. See *International Typographical Union (American Newspaper Publishers Association)*, 86 NLRB 951, 968; *Chicago Typographical Union No. 16 (Chicago Newspaper Publishers Association)*, 86 NLRB 1041, 1056; *American Newspaper Publishers Ass'n v. National Labor Relations Board*, 193 F. 2d 782, 787–796 (C.A. 7); *Evans v. International Typographical Union*, 76 F. Supp. 881, 890–893, 81 F. Supp. 675 (S.D. Ind.). And see the testimony of ITU President Randolph at R. 216 ff.

Board in *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 119 NLRB 883* (R. 646–647, 662–663, 705–709).

As to practice, the Board found that mail room foremen actually hired pursuant to a priority system based upon the laws and constitutions of the ITU and the respondent local union, and that the apprenticeship and competency systems established in the contract were so operated as to give unlawful preference for jobs to union members (R. 672–673, 705–708). In addition, the Board found that two non-union employees, Burton Randall at the News, and Julius Arrigale at the Journal, were discriminatorily denied employment opportunities as a direct result of the unlawful preferential hiring system in effect at the mail rooms of the News and the Journal (R. 675–677, 679–680).

In relevant part, the Board's order (R. 712–719, 728, 752–753) requires the News to cease and desist from its violations of Section 8(a) (1) and (3), and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the order requires the News to specify in its current contract with the Union that the provisions of the ITU General Laws found illegal by the Board are not incorporated in the contract, and to indicate which provisions of the Laws are incorporated and operative; to notify mail room employees that they are not

* The Board's *Mountain Pacific* principle is before the Court in *Local 357, Teamsters* v. *National Labor Relations Board*, No. 64, this Term.

bound to follow provisions of the Laws which call for a closed shop or union preferential hiring; to reimburse all employees and former employees in the mail room for dues and assessments paid to the Union for a period beginning six months before the date of the filing and service of the charges against it; and to post an appropriate notice.

In parallel terms, but extended to cover all New York City newspaper publishers, the order requires the Union to cease and desist from its correlative violations of Section 8(b) (1)(A) and (2) of the Act, and to take substantially the same affirmative action as the News.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order. The court held that the clause in the contract purporting to incorporate only ITU General Laws "not in conflict * * * with federal or state law" must be taken at face value, and hence the contract could not be deemed to include the closed-shop provisions in the Laws. It distinguished its prior decision in *Red Star Express Lines* v. *National Labor Relations Board,* 196 F. 2d 78, on the ground that there is a difference between specifically setting forth illegal union-security provisions in the contract and then purporting in an addendum to suspend any "illegal" clauses (the situation in *Red Star*), and incorporating only the "legal" provisions of union rules some of which are illegal (the situation here). In the court's view, the "natural and foreseeable conse-

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quence" of the latter type of provision, unlike that of the former, would not be to encourage union membership (R. 825–826).

The court further found that the contract did not delegate to the Union exclusive control over seniority or hiring, and was not otherwise unlawful. The court also rejected the Board's finding that respondents, in practice, maintained and enforced unlawful closed-shop and preferential employment conditions, and that the apprenticeship and competency systems established in the contract were so operated as to give unlawful preference for jobs to union members. In the court's view of the evidence, the hiring practices were based on valid criteria of competency and dependability and only coincidentally resulted in union members being hired first. Finally, based on these findings as to hiring practice, the court concluded that Randall and Arrigale had not been discriminatorily denied employment opportunities (R. 834–835).[10]

SUMMARY OF ARGUMENT

A. A "closed-shop" contract, which conditions employment upon union membership, violates Sections 8(a)(3) and 8(b)(2) of the Act because it classifies employees into two groups, those who are union members and those who are not, and declares that only

[10] The court did, however, agree with the Board's finding that employee Burton Randall at the News was denied one night's work because he filed an unfair labor practice charge against respondents. But, since this matter covered "so small a portion" of the Board's order, the court denied the petition for enforcement *in toto* and left it for the Board, "if so advised," to enter an order consistent with the court's opinion (R. 836).

the former can obtain employment. Therefore, even apart from its actual enforcement, such a contract effects a discrimination in regard to hire which tends to encourage union membership.

The issue here is whether the Board may properly conclude that a collective bargaining agreement which purports to incorporate union working rules "not in conflict with * * * federal or state law," but which does not specify that the rules which require union membership as a condition of employment are excluded as illegal, establishes a closed shop hiring system. That is, although the contract here defines "journeyman" without regard to union membership considerations, the ITU General Laws require that he be an ITU member in good standing. The contract specifically incorporates those General Laws "not in conflict with * * * federal or state law." It is the Board's position that, in view of the ITU's past attempts to maintain closed shop conditions in shops within its jurisdiction and the role played by the General Laws in this effort, the contracting parties could reasonably foresee that, with the vague exclusionary clause, the employees would be unable to separate the legal from the illegal provisions of the Laws and would consequently interpret the contract as incorporating all of the Laws, including those requiring union membership as a condition of employment. Accordingly, the Board considered that the situation is just as though the parties intended to, and did, incorporate into their contract the closed shop provisions of the General Laws. See *Radio Officers'*

Union v. *National Labor Relations Board,* 347 U.S. 17, 45.

B. From its inception until the enactment of the 1947 amendments to the Act, the ITU avowedly operated on a closed shop basis. The closed shop was imposed mainly by the insertion of the ITU General Laws into collective bargaining contracts. The General Laws achieved this objective by provisions restricting work in various occupational categories to ITU members; requiring the foreman to be a union member and to be vested with sole authority in the composing room to hire and fire; obligating the foreman to hire in accordance with a priority and seniority system for union members; and giving the ITU control over the apprentice system.

When the Act outlawed the closed shop in 1947, the ITU nevertheless sought to continue operating under that condition. It did not alter the closed shop provisions of the General Laws, but adopted a no-contract policy under which its members, instead of working under a contract, would work only under conditions specified by the Union. Later, the ITU offered the publishers the alternative of a contract, which was subject to cancellation by either party on 60 days' notice. The Board found, and the courts agreed, that these proposals were devices designed to compel employers to continue operating under closed shop conditions, and thus were violative of Section 8(b)(2) of the Act. See *American Newspaper Publishers Ass'n* v. *National Labor Relations Board,* 193 F. 2d 782 (C.A. 7), affirmed on another point, 345 U.S. 100.

C. The ITU then adopted the procedure which is at issue here. It resumed its practice of entering into a one-year contract, with the contract containing the traditional clause incorporating the General Laws. However, the qualifying phrase in that clause, "not in conflict with this contract," was expanded to read, also not in conflict with "law." The provisions of the Laws remained essentially the same. The ITU never furnished its locals or its members a specific list of which of the General Laws were in conflict with the Act and thus suspended, nor did it instruct its foremen as to which of their obligations under the General Laws and as union members were in conflict with the Act and no longer binding in the discharge of their hiring function.

In light of the history showing that the General Laws have been the principal means by which the ITU has achieved and maintained closed shop conditions, that its members were carefully schooled in the details and nuances of the Laws, and that, even after the Act's ban on the closed shop, the ITU sought by numerous devices to maintain closed shop conditions, the contracting parties could reasonably expect that the employees would attribute little significance to the addition of the general phrase "not in conflict with law," and would tend to view the Laws clause as serving its traditional function of incorporating the closed shop provisions of the General Laws no less than the other provisions. An "employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of question-

able validity exists, if only as a hedging device against a possible future upholding of the clause." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed on another point, 347 U.S. 17. The individual employee or foreman, if he noticed the exclusionary language at all, would interpret it, not as requiring him to determine the legality of particular provisions of the General Laws, but merely as indicating that at some future date a judicial determination might be made that certain of the Laws could not have been applied. Meanwhile, he would continue to regard all provisions of the Laws, including those requiring ITU membership as a condition of employment, as in effect.

Hence, in the Board's view, employees who were already ITU members would be encouraged to retain that membership, prospective employees would either be prompted to acquire such membership or be deterred from seeking employment, and, in hiring and firing, the foreman would similarly be governed by union membership considerations. Indeed, the conduct of the hiring in this case shows that the contract was in fact so interpreted. Hiring at both the News and the Journal proceeded in accordance with the priority system specified in the ITU Laws, with preference being given to union members.

D. The distinction drawn by the court below between the clause here and that involved in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78 (C.A. 2), is without substantial basis. From the standpoint of the employees and in the context of practical industrial realities, no meaningful

distinction can be made between setting out questionable union-security provisions in the contract and then purporting to suspend them if they are "illegal" (the situation in *Red Star*), and incorporating by reference only the "legal" provisions of union rules which include questionable union-security provisions (the situation here). In either case the burden of determining legality is shifted to the employee. In the Board's view, employees in an industrial plant cannot be expected to and would not play the role of lawyer or judge, but would instead tend to comply with a doubtful provision and leave the determination of its ultimate validity to an appropriate tribunal.

On no firmer footing is the ITU's contention that its technique of incorporating General Laws to the extent "not in conflict with law" is privileged because the ITU represents employees in some plants where the closed shop is legal, and the complexities of industry make it difficult to particularize the circumstances wherein the Laws would or would not be legal. Assuming a certain administrative burden in differentiating the applicable Laws in given circumstances, this does not justify an incorporation technique which infringes the Section 7 rights of employees in those plants where closed shop provisions are illegal.

Nor does the Board's holding here constitute an unwarranted intrusion into the substantive aspects of the collective bargaining process. The Act permits the parties to draft their union-security provisions in whatever form they desire so long as the foreseeable effect of the language chosen is not to

in good standing (see n. 4, *supra*). The contract further provides that the General Laws "not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein" (R. 534). It is the Board's position that, in the light of the ITU's past efforts to maintain closed shop conditions and the role played by the General Laws in that effort, the contracting parties could reasonably foresee that, without a specification of which laws were excluded, the employees would regard all of them as operative, including the provisions requiring journeymen to be union members. Thus, the parties must be deemed to have intended to incorporate those provisions. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45. The situation, therefore, is just as though the contract had specifically imposed closed shop conditions.

The Board's interpretation of the effect of the "General Laws clause" was rejected by the court below,[13] but was accepted by the First Circuit in *International Typographical Union (Haverhill Gazette)* v. *National*

[13] See also *Honolulu Star-Bulletin* v. *National Labor Relations Board*, 274 F. 2d 567 (C.A.D.C.). There, however, the court also relied upon an express provision of the contract that. "The term 'journeymen' and 'apprentices' shall in no way be understood to apply exclusively to members of the * * * Union" (274 F. 2d at 569), a disclaimer not included in the contract here or in No. 340. And, to resolve any remaining ambiguity, the court further relied upon a practice—again not present here or in No. 340—of hiring nonunion men as journeymen.

Cf. *Lewis* v. *Quality Coal Corp.*, 270 F. 2d 140 (C.A. 7), certiorari denied, 361 U.S. 929; *Perry Coal Co.* v. *National Labor Relations Board*, C.A. 7, December 2, 1960, 47 LRRM 2208.

Labor Relations Board, 278 F. 2d 6, certiorari granted, No. 340, this Term. See also *Albert* v. *International Typographical Union,* 161 F. Supp. 427 (D. Mass., Aldrich, J.). We shall show that the conclusion reached by the Board is a reasonable one and consequently was entitled to stand.[14]

B. THE HISTORY OF THE ITU'S EFFORTS TO MAINTAIN CLOSED SHOP CONDITIONS [15]

1. *The situation prior to the 1947 amendments to the Act*

From its inception about 100 years ago until the enactment of the 1947 amendments to the Act, the ITU avowedly operated on a closed shop basis. The

[14] This case and the companion No. 340 have been set down for argument following Nos. 64 and 68 (R. 837). Both of these cases likewise involve illegal hiring practices. In No. 68, as here, the practice is illegal because, in the Board's view, it conditions employment on union membership. Assuming there is a substantial basis for the Board's view (which is challenged here but not in No. 68, where the only contest is over the propriety of the reimbursement remedy), it is readily apparent, as we have shown p. 20, *supra*, that such a hiring practice effects a discrimination in employment which tends to encourage union membership. In No. 64, on the other hand, the practice is illegal because, although the discrimination in employment does not turn on union membership, it nonetheless tends to encourage such membership in that the union has been delegated exclusive control over hiring without adequate safeguards to insure that this power will be exercised without regard to the employee's union status. In short, the basic question here is whether the contract in fact conditions employment upon union membership, whereas in No. 64 it is whether the discrimination implicit in according jobs only to employees who have been referred by the union tends to encourage union membership, absent the Board's *Mountain Pacific* (119 NLRB 883, 893) safeguards.

[15] The following account is based primarily on the facts found, by the Board and the lower courts, in the earlier Board pro-

> what the "laws" provide. * * * It has long been traditional in the industry to consider the ITU General Laws as a part of every contract; indeed the obligation to observe pre-existing ITU laws was expressed in Nation-wide abitration agreements between the ITU and the [American Newspaper Publishers Association] in force from 1901 to 1922. The ITU has steadfastly maintained the position that its laws were an internal union matter, not subject to arbitration, and it was over this issue largely that relations between the ITU and the ANPA were broken in 1944. Since that time the ITU has declined to approve any local contract which did not expressly or in substance provide:
>
> "That the General Laws of the International Typographical Union in effect [January 1 the preceding year], not in conflict with this contract, shall govern the relations of the parties on conditions not specifically enumerated herein."

The General Laws imposed closed shop conditions by these means:

First, the Laws contained a number of clauses restricting work in various occupational categories to ITU members. Typical of these is the provision (Article V, Section 11[16]) that (R. 555):

> All persons performing the work of foremen or journeymen, at any branch of the printing trade, in offices under the jurisdiction of the International Typographical Union, must be active members of the local union of their

[16] References are made to the 1957 edition of the General Laws, which is in the printed record.

craft and entitled to all the privileges and benefits of membership.

Second, the Laws not only required that the foreman be a union member, but also provided (Article V, Section 1) that he "is the only recognized authority" in the composing room, thereby vesting him with exclusive power to hire and fire. Hence job applicants were required to seek employment through the union foreman, who, like other ITU members, took an oath, upon admission to the union, "to support the [ITU] laws, regulations and decisions," and "to use all honorable means within my power to procure employment for members of the [ITU] in preference to others." [17]

Third, the General Laws (Article V, Section 1) obligated the foreman to hire in accordance with the priority system set forth therein. Under this system, local unions registered the length of continuous service in a printing shop of each of its members. This schedule was then used by the foreman for the purpose of hiring and laying off employees, preference being given to those with the most priority. In practice, the system operated as follows (*International Typographical Union,* 86 NLRB 951, 973):

> Each office has a group of regular situation holders who work steadily and another group who appear for extra or substitute work. At each chapel (the local union's office unit) there is maintained a slipboard (priority board) which is the property of the union and subject

[17] The preference clause was deleted from the oath in 1953 (R. 234–235).

> to its exclusive control. A union member seeking work at that particular chapel * * * has his card registered at the foot of the slipboard, after clearing with the Union's chapel chairman. When a situation vacancy occurs, or an extra position is to be filled, the foreman selects the person with the highest priority who is competent to fill the job. * * * [I]n the event of temporary absence [of a regular situation holder], he selects himself, without clearing with the foreman, a competent substitute from the slipboard to fill his place.

The system provided no method whereby a non-union printer could be hired as such; he would first have to be admitted to membership in the Union.

Finally, the General Laws established a union-controlled apprenticeship system. Under the Laws, a person could become an apprentice only after being approved by the local union, and passing technical and physical examinations (Article I, Section 4). At the end of the first year, if the apprentice proved competent, he was admitted into the Union as an apprentice member, and, in addition to his job training, he began a course of study prepared and administered by the ITU. The lessons in this course included the subject of trade unionism as well as the principles and techniques of printing (Article I, Sections 3, 10). Supervision of the entire apprentice program of study and training on the job was undertaken by the union foreman and a committee on apprentices, which was provided for by the local union and in which employers were encouraged to participate (Article I, Sections 14 and 15). At the completion of six years, and after

passing a final examination, the apprentice was eligible to become a journeyman printer and a union member in full standing (Article I, Section 1).[18]

2. *The ITU's response to the 1947 amendments*

The Taft-Hartley amendments to the Act, which became effective in August 1947, outlawed the closed shop. However, even before the amendments took effect, the ITU indicated that it had no intention of giving up its traditional closed shop practices.

Thus, in the March 1947 issue of the ITU Journal, its members were told, with respect to the pending legislation:[19]

> For nearly a century * * * the International Typographical Union operated on the closed shop principle. It has been the accepted practice in the printing industry * * *. It will continue to so operate * * *.
>
> * * * It is intolerable and unthinkable that union printers would work with non-union men under conditions fostered by the "open shop." When confronted with that choice members of the I.T.U. will do what comes naturally.

Similarly, in May 1947, ITU President Randolph told a Congressional committee considering the amendments that:

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[18] An applicant could be admitted to membership without serving an apprenticeship if able to pass a competency test administered by the Union (ITU bylaws, Article XVI, Section 3).

[19] This and the quotations which follow are set forth in the opinion of the Seventh Circuit in *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782, 789–790.

> At no time has the International Typographical Union or any local thereof operated on other than a closed shop basis and whether it can make contracts thereof or not, it will continue to function on that basis.

In the July 1947 issue of the ITU Journal, President Randolph repeated:

> * * * So far as the Typographical Union is concerned, we do not intend to have any of our rights and prerogatives, enjoyed for a hundred years, set aside by laws adopted under the lash of party leadership in Congress inspired by representatives of big business * * *.

And, in the August 1947 issue, he added:

> The theory of the Taft-Hartley Law is that now an employer can "shoe horn" some non-union men into a union composing room and be protected against our men walking out. That is theory only. The condition is that our members will walk out.

Accordingly, when the Taft-Hartley ban on the closed shop took effect, the ITU did not alter the closed shop provisions of the General Laws or notify its members that they were no longer effective. Instead, it advised its locals to terminate existing contracts and submit to employers a proposal whereby employees would no longer work under a written contract but pursuant to specified Conditions of Employment. The Conditions, *inter alia*, were that members could seek other employment or refuse to work whenever they became dissatisfied with conditions in the shop; they would work only under direction of a foreman who was a union member and vested with full

control over hiring and firing; and the composing room would be operated under the laws of the ITU. The publishers, believing that this no-contract proposal violated the amended Act, filed unfair labor practices charges with the Board. Thereupon, the ITU offered the publishers the alternative of a contract, which was subject to cancellation by either party on 60 days' notice. The contract, *inter alia,* provided that the General Laws of the ITU, not in conflict with law or this contract, would govern relations between the parties; the union could unilaterally make and enforce the rules under which its members might seek or accept employment; and any refusal of union members to work with non-union employees would not constitute a breach of the agreement.

The General Counsel of the Board issued unfair labor practice complaints, alleging, *inter alia,* that the ITU's no-contract and 60-day contract proposals were merely devices for perpetuating closed shop conditions in violation of the amended Act, and that certain clauses of the proposed contract, including those mentioned above, in themselves manifested an intent to operate under such conditions. The District Court, after hearing, found reasonable cause to believe that the charges were true, and issued an injunction under Section 10(j) of the Act, pending a final Board determination. The injunction enjoined the Union, pending a final Board determination, from continuing its no-contract and 60-day contract proposals, and from giving effect to any of the ITU laws which would cause employees to be discriminated against

because of non-membership in the Union. *Evans* v. *International Typographical Union*, 76 F. Supp. 881 (S.D. Ind.), February 25, 1948. Thereafter, the Union was adjudged in contempt of the injunction, by distributing new form contracts containing competency and apprenticeship clauses which discriminated against non-members of the ITU. *Evans* v. *International Typographical Union*, 81 F. Supp. 675 (S.D. Ind.), October 14, 1948.[30]

On October 28, 1949, the Board issued its decision and order in the cases. *International Typographical Union (American Newspaper Publishers Association)*, 86 NLRB 951; *Chicago Typographical Union No. 16 (Chicago Newspaper Publishers Association)*, 86 NLRB 1041. It found, *inter alia*, that the ITU's no-contract and 60-day contract proposals were maneuvers designed to compel employers to continue operating under closed shop conditions, and were thus violative of Section 8(b)(2) of the Act. Believing that a remedy against these practices would be sufficient to deter the ITU from pursuing its illegal objective, the Board found it unnecessary to decide the further question of whether the clauses in the proposed contract, in themselves, amounted to the imposition of closed shop conditions (see 86 NLRB at

[30] The court found no contempt with respect to the inclusion of a foreman clause, providing that hiring shall be done by the foreman who shall be a union member. In so concluding, the court was influenced by the fact that "there has been no clear and convincing proof that where an employer has objected to [the foreman] clause the respondents have refused to approve a proposed contract, although otherwise acceptable, because it did not" contain that clause (81 F. Supp. at 685).

1044). Accordingly, the Board ordered the Union to cease and desist from the unfair labor practices found. On December 27, 1951, the Board's action was sustained by the Seventh Circuit. *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782.[21]

C. VIEWING THE "GENERAL LAWS" CLAUSE OF THE CONTRACT HERE AGAINST THIS BACKGROUND, IT WAS REASONABLE FOR THE BOARD TO CONCLUDE THAT THE PARTIES MUST BE DEEMED TO HAVE CONTEMPLATED A CONTINUATION OF THE CLOSED SHOP CONDITIONS, AND THAT THE EMPLOYEES WOULD SO UNDERSTAND

After the litigation described above, the ITU adopted the procedure which is at issue here and in No. 340. It resumed its practice of entering into a one-year contract, with the contract containing the traditional clause incorporating the General Laws of the ITU. However, the qualifying phrase in that clause, "not in conflict with this contract," was expanded to include the terms "law" or "federal or state law" (see R. 239, 245). But, apart from adding a comparable general proviso to the Laws themselves,[22] essentially no changes were made therein. They con-

[21] Also involved in the case was the question of whether the ITU's insistence upon "setting bogus" violated Section 8(b)(6), the featherbedding provision of the Act. The Board held that this section was not violated, and the Seventh Circuit agreed. This aspect of the case was involved in *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 345 U.S. 100, wherein this Court sustained the view of the Board and the Seventh Circuit.

[22] Article XIV, Section 1, added to the General Laws in 1953, provides that, where the observance of any of its provisions "would be contrary to public law, they are suspended so long as such public law remains in effect" (R. 246).

tinued to contain the provisions restricting work in various occupational categories to ITU members; requiring the foreman to be a union member and to be vested with sole authority in the composing room (and, indeed, the contract contained specific clauses reemphasizing this point, see p. 7, *supra*); obligating the foreman to hire in accordance with the priority system for union members; and giving the Union control over the apprentice system (pp. 27–28, *supra*, and G.C. Exh. 20, Article I).

Moreover, the ITU never undertook to give its locals or its members a specific list of which of the General Laws were in conflict with the Act and thus suspended (R. 276–278). Nor did the Union instruct its foremen as to which of their obligations under the General Laws and as union members were in conflict with the Act and were no longer binding in the discharge of their hiring function (R. 284). Indeed, as the facts in No. 340 show, when, in the course of bargaining for a new contract, the publisher sought to have the Union particularize in the contract which of the General Laws were regarded as still operative, the Union declined to do so, insisting upon the vague type of laws clause used here.

In the light of the history (pp. 23–32, *supra*) showing that the General Laws have been the principal means by which the ITU has achieved and maintained closed shop conditions, that its members were carefully schooled in the details and nuances of the Laws, and that, even after the Act's ban on the closed shop, the ITU sought, by numerous devices, to maintain closed shop conditions, the contracting parties could

reasonably expect that the employees would attribute little significance to the addition of the general phrase "not in conflict with law" to the Laws clause of the contract, and tend to view that clause as serving its traditional function of incorporating the closed shop provisions of the General Laws no less than the other provisions. That is, it would be unlikely that an employee or a foreman would go over the voluminous ITU Laws, provision by provision, and attempt to determine what provisions were likely to be illegal and thus no longer operative. Instead, being aware of no specific change in the Laws themselves, they would tend to assume that they were still incorporated in the contract and controlled employment, as in the past, at least until an appropriate tribunal had ruled otherwise. An "employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed on another point, 347 U.S. 17.

In short, the individual employee or foreman, if he noticed the exclusionary language "not in conflict with law" at all, would interpret it, not as requiring him to make a determination of the legality of particular provisions of the General Laws, but as merely indicating that, at some future date, there might be a judicial determination that certain of the Laws could not have been applied. Meanwhile, he would

continue to regard all provisions of the Laws, including those requiring membership in the ITU as a condition of employment, as in effect. Hence, employees who were already ITU members would be encouraged to retain that membership, prospective employees would either be prompted to acquire such membership or be deterred from seeking employment, and, in hiring and firing, the foreman would similarly be governed by union membership considerations.

Indeed, because the union security provision of a contract has an impact on employees apart from its enforcement (p. 20, *supra*) and because employees are not likely to read the contract provision as a lawyer would, but instead would resolve any ambiguity in favor of complying, the Board, even without the history here, has consistently taken the position that the effect of an unlawful union security requirement is not aborted by a general clause which purports to suspend it insofar as it is unlawful.[23] And the courts, including the court below, have consistently sustained the Board's holding in such cases. *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 80–81 (C.A. 2); *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed on another point 347 U.S. 17; *National Labor Relations Board* v. *Gottfried Baking Co.*, 210 F. 2d 772, 780 (C.A. 2); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519, 521 (C.A.

[23] *Lykens Hosery Mills, Inc.*, 82 NLRB 981, 982–983; *Reading Hardware Corp.*, 85 NLRB 610, 611; *Red Star Express Lines*, 93 NLRB 127, 128, enforced, 196 F. 2d 78 (C.A. 2). See also *Keystone Coat, Apron & Towel Supply Company*, 121 NLRB 880. Cf. *Schaefer Body, Inc.*, 85 NLRB 195, 196; *Barium Steel and Forge, Inc.*, 88 NLRB 564.

9); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 557–558 (C.A. 10).[24]

The record here demonstrates the validity of the Board's view of the effect of the "Laws" clause. Superintendent Rottenberg and Foreman Every, who did the hiring at the New York Daily News and the Wall Street Journal, respectively, both testified that they abided by the ITU "book of laws" (R. 141, 152, 371). Every further testified that he had never received instructions from the publisher respecting his duties as foreman, and hence only knew those duties "from the union point of view" (R. 392, 417). Moreover, Every indicated that he understood his obligation to live up to the ITU rules to mean that he should "give a break to union members before giving a break to non-union members" (R. 394; see also 411–415), and that, as far as he knew, there was nothing in the Union's rules that conflicted with the Taft-Hartley Law (R. 395).[25]

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[24] As we show, pp. 39–41, *infra*, there is no merit to the attempt of the court below to distinguish these cases on the ground that there the illegal provision was specifically set out in the contract, whereas here it was contained in union rules which were incorporated into the contract insofar as "not in conflict with law."

[25] The following is a verbatim account of that testimony (R. 394–395):

> Q. [by Union counsel] Do you remember * * * provisions of laws and the constitution of the union requiring a member of the union and a foreman to give a break to union members before giving a break to non-union members? * * *
>
> A. [by Foreman Every] Yes, I recall something.
>
> Q. When you say you attempt to live up to the constitu-

Accordingly, hiring at both the News and the Journal proceeded in accordance with the priority system specified in the ITU Laws, with preference being given to union members. Thus, as shown pp. 8–9, *supra,* the chapel chairman or union steward prepared lists of "regular situation holders" and "regular substitutes," which were limited to union members (R. 147, 374), and placed them in the order in which they deposited their union card with the chapel chairman. The foreman first hired from these lists, in priority order. If, after exhausting the lists, men were still needed, he then turned to those "shaping the shop." From these, the foreman would first select "outside card men," *i.e.,* union members from other shops who were looking for extra work, and only thereafter would he hire non-union men. An outside card man would be preferred over a non-union man even though the latter was more experienced in the work of the shop.[26]

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tion and laws, do you attempt to live up to that obligation too?

A. Yes.

* * * * *

Q. Wherever there is or may be a conflict between the Taft-Hartley Law, or any other law of the land, and the requirements of the constitution and general laws, which do you understand are to prevail in your carrying on your duties as foreman?

A. Well, the Taft-Hartley Law is probably recognized as the main thing. But there is nothing in our books contrary to that that I know about.

[26] The court below overlooks certain essential facts in concluding (R. 832) that, since all of the union men were journeymen and the non-union men were not, the hiring procedure could be explained on the basis of "nondiscriminatory con-

In sum, in view of the history of the ITU's efforts to maintain closed shop conditions and the role played by the General Laws in this effort, the Union and the publishers had reason to believe that, without specifying what provisions of the Laws were deemed illegal and thus excluded, the employees and the foremen would tend to view them as all operative, including the closed shop provisions, at least until an appropriate tribunal should rule otherwise. And the conduct of the hiring in this case shows that the contract was in fact so interpreted. Since a person is deemed to intend the foreseeable consequences of his conduct (*Radio Officers' Union* v. *National Labor Relations*

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tractual criteria, i.e., competency as evidenced by journeymen status, and seniority based upon length of employment as a journeyman with the hiring employer and as a journeyman elsewhere in the industry." Thus, Foreman Every testified that, as between a union and a non-union shaper, both of whom were equally competent, he would hire the union man first, and that a regular situation holder would lose his priority if he lost his membership in good standing in the Union (R. 672; 413–414, 417–418). Similarly, when non-union employee Randall, a 10-year veteran at the News, protested to Superintendent Rottenberg about the hiring of a large number of outside card men who had shaped-up on the eve of a holiday to get the double pay, Rottenberg replied, not that they were more competent, but merely that union men had to go to work ahead of non-union men (R. 667; 93). Finally, the fact that it was union membership rather than competency which governed priority and seniority is shown by the circumstance that, when, in the spring of 1956, the Union decided that it needed more journeymen and gave competency tests to a group of non-union extras, these men were not placed on the priority list as soon as they had passed the tests but only after they had been admitted to union membership, had deposited their membership cards with the chapel chairman, and had been certified by him (R. 672; pp. 10–11, *supra*).

Board, 347 U.S. 17, 45), the legal effect of the General Laws clause is thus the same as though the ITU and the publishers had specifically set out closed shop provisions in the contract.

D. THE CONTENTIONS WHICH HAVE BEEN ADVANCED TO THE CONTRARY DO NOT IMPAIR THE BOARD'S CONCLUSIONS WITH RESPECT TO THE GENERAL LAWS CLAUSE

1. In accepting its earlier holdings in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, and related cases, which it distinguishes (R. 825), the court below agreed that, had the contract here specifically recited the provisions of the General Laws requiring ITU membership as a condition of employment and then added a clause such as "provided not in conflict with law," the Board could properly have found that the contract contained illegal union-security provisions. The court, however, treats the situation here as different because, since the contract does not set out the illegal union-security provisions but merely refers to the General Laws (which do) and purports to include them only to the extent they are not "in conflict with law," there has been no physical incorporation of illegal provisions in the contract. As the First Circuit properly concluded in the *Haverhill* case, 278 F. 2d 6, No. 340, this Term, there is no merit to this distinction.

Even if it be assumed that, as a matter of private contract law, the technique used here would be sufficient to exclude from the contract the illegal provisions, that does not end the matter. As the court below itself recognized in *Red Star*, 196 F. 2d at 81, "the question is not only whether under principles of contract

law the addendum would contractually negative the illegal union security clauses, but whether it would have the effect of preventing the coercion that would otherwise follow." In other words, the question is whether the employees involved would tend to view the contract here any differently from that in *Red Star,* and, if not, it is unlawful here no less than there.

From the standpoint of the employees, no meaningful distinction can be made between setting out questionable union-security provisions in the contract and then purporting to suspend them if they are "illegal" (the situation in *Red Star*), and incorporating by reference only the "legal" provisions of union rules which include questionable union-security provisions (the situation here). In both cases, the burden is shifted to the employee to forecast whether the union-security provisions are legal or illegal, and thus effective under the contract. Indeed, the clause here puts an even greater burden on the employee than does the one in *Red Star*; there, at least, his attention is directed to the union-security provision, while here, with no particular provision of the General Laws being earmarked for scrutiny, he must first guess what portions of the voluminous Laws would conceivably present a legal issue." It is the Board's judgment, and human

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[27] The fact that the question of what Laws may be legally applied was not subject to a fixed answer at the time the contract became effective is emphasized for the employee by Section 38 of the contract, which, in relevant part, provides (R. 537–538):

> * * * It is understood and agreed * * * that if any provision modified from any preceding contract or excluded from this contract solely because of the restrictions of

experience supports it, that employees in an industrial plant cannot be expected to play the role of a lawyer or judge, but would instead tend to comply with a doubtful provision and leave the determination of its ultimate validity to an appropriate tribunal. Hence, whether confronted with the clause here, or the one in *Red Star,* the response of the employees is likely to be the same. As the First Circuit summed up in *Haverhill,* 278 F. 2d at 13, n. 14: "We perceive no reason why the coercive effect of the illegal clauses would be lessened if, as in this case, they are incorporated by reference into the contract, rather than written into the contract itself."

2. Nor is the foregoing analysis unrealistic, as the Union contends (memorandum in response to petition for certiorari, pp. 4–5). The Union asserts that the employees are not apt to be coerced by the contract because, on reading it, they will see that it is valid on its face and that the General Laws are added only to the extent that they are not in conflict with the contract and applicable law; to assume that they would then turn to the General Laws and conclude that their closed shop provisions are nevertheless in the contract attributes to the employees "a rare ob-

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law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof.

* * * Should * * * any provision of this agreement, at any time during its life, be in conflict with Federal or State Law or regulation then such provision shall continue in effect only to the extent permitted. * * *

tuseness or cynical skepticism." This argument puts the cart before the horse. Given the previously described background of the ITU's efforts to maintain closed shop conditions through, *inter alia,* making the General Laws a part of every contract, the employee would tend to regard all of the provisions of the laws, including the closed shop requirements, as operative unless clearly advised otherwise; a look at the contract does not furnish such enlightenment, for it incorporates the General Laws subject to exceptions which are not specific (see R. 554).[28]

3. On no firmer footing is the Union's contention that the technique of incorporating the General Laws to the extent they are not in conflict with law cannot be regarded as unlawful since there are legitimate reasons for the use of that procedure, rather than specifying which of the Laws are incorporated. Thus, ITU President Randolph testified that the ITU represents employees in some plants where the closed shop would be legal, and the complexities of industry were such that it was difficult to spell out under what

[28] Nor is it likely that, because Section 20-b of the contract (R. 533) defines "journeymen" without regard to union membership considerations, the employees would tend to regard the General Laws definition of the term (see Article V, Section 11, R. 555) as "in conflict with the contract" and thus excluded. With the background described pp. 23–30, *supra*, it is more likely that the employees would regard the requirement of union membership set forth in the General Laws as *supplementing*, rather than in conflict with the contract, at least absent a specific provision in the contract, as there was in *Honolulu Star-Bulletin* v. *National Labor Relations Board*, 274 F. 2d 567, 569 (C.A.D.C.), that the term journeymen "shall in no way be understood to apply exclusively to members of the International Typographical Union."

circumstances the various provisions of the General Laws would or would not be legal (R. 244, 249, 251). Granted that this is so, it still does not privilege the use of an incorporation technique which, as we have shown, tends to infringe the Section 7 rights of employees in those plants where closed shop conditions would be illegal. Moreover, as Judge Aldrich pointed out in *Alpert* v. *International Typographical Union*, 161 F. Supp. 427, 431 (D. Mass.), an earlier stage of the *Haverhill* case, involved in No. 340: "* * * [I]f union lawyers cannot separate the wheat from the tares, how can Gazette, Gazette's employees, and prospective employees? A collective bargaining agreement should be understandable in the marketplace, not in Utopia. Its specific provisions must be compatible with the Taft-Hartley Act on their face, and not as the result of some subsequent elimination or construction."

4. The vagueness of the Laws clause cannot be justified by relying on the fact that the Board order here requires the employer and the Union to post a notice stating they will not encourage union membership by discriminating "in regard to hire, tenure or terms and conditions of employment, except to the extent permitted by Section 8(a)(3) of the Act" (R. 721, 724). See *Honolulu Star-Bulletin* v. *National Labor Relations Board*, 274 F. 2d 567, 570 (C.A. D.C.). Since Section 8(a)(3) contains but one exemption, which is specifically set out—*i.e.*, a union-security agreement which meets the requirements enumerated—the employee can, by looking at the statute, readily ascertain what is meant by "except to the

extent permitted by Section 8(a)(3)." A reading of the General Laws, on the other hand, would afford no similar means of separating the licit from the illicit. Moreover, the notices to be posted here give further specificity to the "except clause" by requiring that they be accompanied by instructions to the employees that they are not bound to follow the specific provisions of the General Laws which call for closed shop or union preferential hiring (R. 721, 725).

5. Finally, the Board's holding in this case does not constitute an unwarranted intrusion on the freedom of the parties to a collective bargaining contract to draft their own contract terms. Here, as in *Felter* v. *Southern Pacific Ry. Co.*, 359 U.S. 326, where this Court held that the parties could not by contract require that an employee revoke his checkoff authorization only by means of the form furnished by the union, "[l]atitude is allowed in the terms of such arrangements, but not past the point such terms impinge upon the freedom expressly reserved to the individual employee" (p. 333). The Act permits the employer and the union to couch their union-security provisions in any form they desire, so long as the foreseeable effect of the language chosen is not to lead the employees to believe that they have to join the union in order to secure and retain employment. However, where, as here, the language has that effect, it becomes violative of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded (see n. 1, p. 4, *supra*).

Respectfully submitted.

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DECEMBER 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960